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In the Supreme Court of the United States

OCTOBER TERM, 1968.
No. 1135

FRANCIS J. KAUFMAN,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
now known as
THE PENN CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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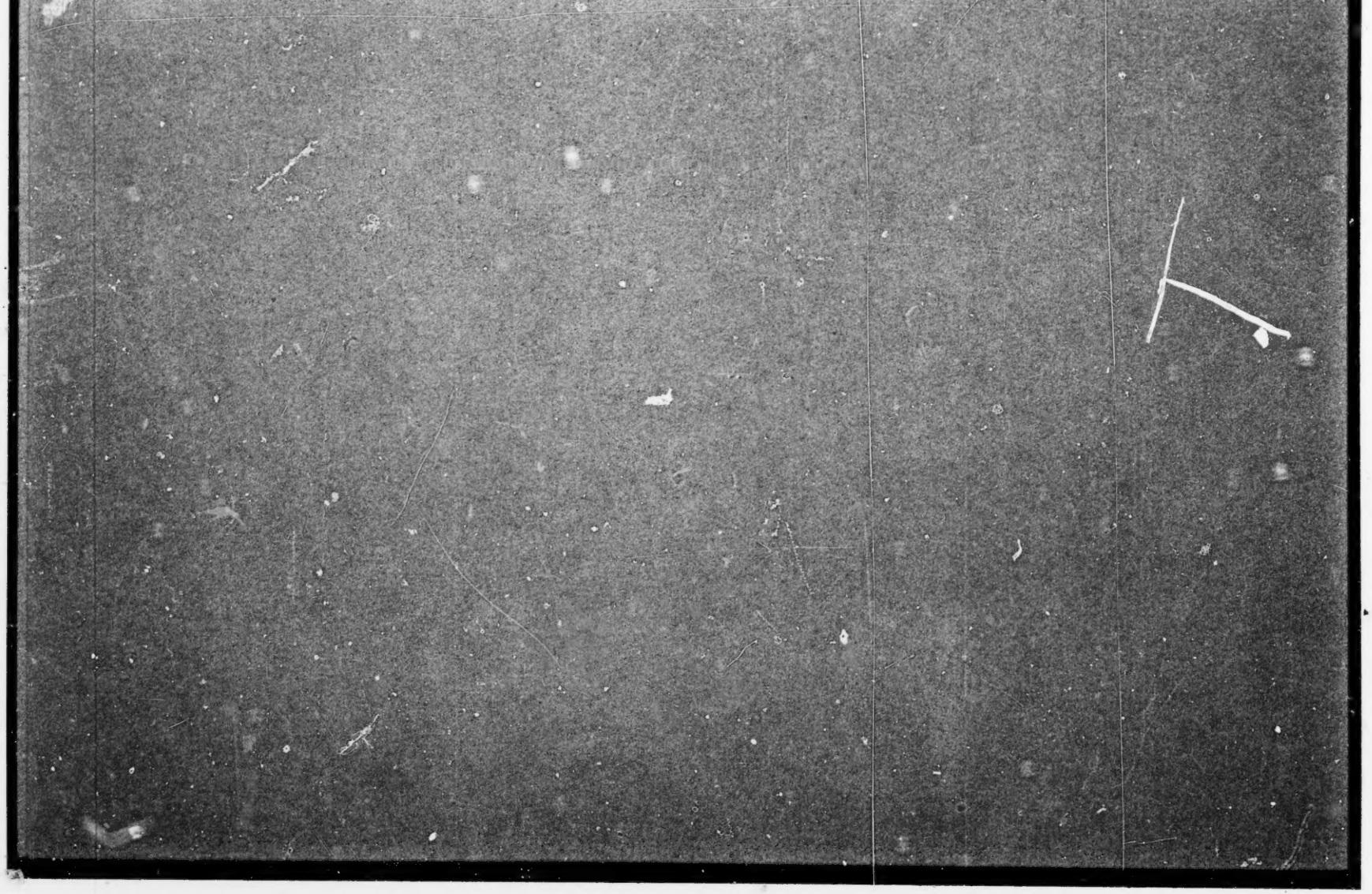

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioners respectfully pray for a writ of certiorari to review the judgments of the Supreme Court of Ohio, the Court of Appeals for the Sixth District of Ohio and the Court of Common Pleas of Lucas County, Ohio, wherein a motion for directed verdict was sustained in favor of respondent and against petitioner in which judgment the courts of Ohio refused to apply the existing federal law in determining the validity or invalidity of a release in a Federal Employers' Liability Act case but applied Ohio law instead.

OPINION.

The Supreme Court of Ohio and the Court of Appeals of the Sixth District of Ohio rendered their decisions without opinion based on the findings of fact and conclusions of law of the Court of Common Pleas of Lucas County, Ohio, which are reproduced in the appendix herein.

JURISDICTION.

The judgment of the Supreme Court of Ohio was rendered on the 11th day of December, 1968.

The jurisdiction of the Court is invoked under the Judicial Code, 28 U. S. C. A. Sec. 1257 (3), at 144 (1948), petitioner having been deprived of his substantial federal right under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51-60, as amended.

QUESTIONS PRESENTED.

(A) May the Courts of the State of Ohio grant a defendant railroad's motion for directed verdict at the close of plaintiff's evidence on the sole ground that Ohio and not federal law applies to the question of validity of releases in Federal Employers' Liability Act cases?

(B) May the Courts of the State of Ohio grant a directed verdict in favor of a defendant railroad on the sole question of whether or not a release was valid when the only evidence adduced at trial was that the plaintiff and the doctors, employed by defendant railroad, all believed that the plaintiff had fully recovered from his injuries when, in fact, plaintiff suffered a recurrence of his previous condition which caused the loss of his job because of physical disability? Plaintiff signed the purported release because he believed that he had fully recovered, as stated by defendant's doctors, thus creating a question of mutual mistake of fact or fraud on the part of the defendant.

STATUTES INVOLVED.

Sections 1, 5 and 6 of the Federal Employers' Liability Act, U. S. C. A. 45, Sections 51, 55 and 56 as amended, relating to the rights of injured employees are set forth in the appendix.

STATEMENT OF CASE.

This is a Federal Employers' Liability Act case in which plaintiff was injured while working at the Air Line Junction Yard of the New York Central Railroad Company in Toledo, Ohio. His injuries were caused by an explosion of a tank car placed in said yard by defendant. The plaintiff-appellant sustained injuries which required hospitalization and treatment, which treatment was afforded him by defendant's doctors. Plaintiff was subsequently discharged from the hospital and released to go back to work with the understanding from defendant's doctors that he had recovered completely, a fact which plaintiff fully believed. Based on his belief, plaintiff signed a release with the defendant railroad and received a nominal sum in consideration thereof. Subsequent to his return to work, plaintiff-appellant suffered a recurrence of his previous condition and was discharged by the defendant-appellee as being physically unfit for work. Plaintiff filed suit under the Federal Employers' Liability Act and defendant-appellee filed an answer thereto setting forth the purported release as a defense. Plaintiff filed a reply setting forth a tender back of the release money and further alleging that the release was obtained by mutual mistake of fact or fraud, and further alleging that he was told that the release was for back wages only. This last allegation was stricken by the trial court. A trial was then had before a jury and at the close of plaintiff's evidence the trial court held that Ohio law was applicable to Federal Employers' Liability Act cases concerning releases and even though defendant employed the doctors that treated plaintiff, the court ruled that these doctors must be considered plaintiff's doctors, therefore, there could be no mutual mistake of fact concerning plaintiff's injuries and directed a verdict accordingly. Upon

motion of the plaintiff-appellant the trial court furnished findings of fact and conclusions of law. A motion by the plaintiff-appellant for a new trial was overruled and, on appeal to the Sixth District Court of Appeals for Lucas County, Ohio, the verdict of the trial court was sustained on June 18, 1968. This appeal is taken from these erroneous decisions. A motion to certify the record to the Supreme Court of Ohio was filed by appellant and said motion was overruled by the Supreme Court of Ohio on December 11, 1968.

REASONS FOR GRANTING THE WRIT.

In this case, the appellant, Francis Kaufman, signed a release and accepted a nominal consideration therefor under the mistaken belief that he had fully recovered from the injuries that he received in the course of his employment. This belief was substantiated by the doctors hired by the appellee, The New York Central Railroad Company, who told Mr. Kaufman that he was all right and that he could return to work. After Mr. Kaufman returned to work he suffered from additional blackouts both on and off the job and further found that he was partially disabled because of his injuries. He informed the appellee of his problems and was sent to Detroit for examination by another railroad physician who disqualified him from further work on the railroad because of his physical infirmities. Upon trial of the case the evidence showed that plaintiff mistakenly believed that he had fully recovered from his injuries and that this belief was concurred in by appellee's doctors. The evidence showed that all of the physicians involved were employed by the railroad and not by appellant. The trial court applied Ohio law and said that, even though the railroad had hired the doctors, these doctors were, in fact, Mr. Kauf-

man's doctors and that any representations made by these doctors could not be attributable to the New York Central. Based on this assumption the trial court said that there could be no mutual mistake of fact or fraud concerning the signing of the release and thereupon directed a verdict in favor of the New York Central at the close of plaintiff's evidence. This decision had been affirmed by the Court of Appeals for the Sixth District of Ohio and is clearly in conflict with the federal law. We will call the Court's attention to *Dice vs. Akron, Canton and Youngstown Railroad Company,* 342 U. S. 359, 72 S. Ct. 312. The question of releases in general under Federal Employers' Liability Act is discussed in the *Dice* case. In that case the petitioner, a railroad fireman, was seriously injured while in the course of his employment. The railroad raised the defense of a written document purporting to be a release signed by the petitioner and in full settlement for $924.63. Petitioner admitted signing the document but set forth the fact that said release was void because of mutual mistake of fact or fraud on the part of the defendant. The Supreme Court of the United States in setting forth petitioner's right held as follows:

> "That the validity of releases under the Federal Employers' Liability Act raises a question to be determined by federal rather than state law. The Court further stated that only if federal law controls can this Federal Act be given that uniform application throughout the country essential to effectuate its purposes."

Thus in the Kaufman case, both the appellate court and the trial court were clearly in error in applying Ohio law.

In addition, the Supreme Court of the United States held that, while Ohio treats factual questions of fraudulent release differently, in Federal Employers' Liability

Act cases a question of whether or not a release was wrongfully obtained should be determined by a jury rather than a judge. The Supreme Court went on to say that the right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence and that it is part and parcel of the remedy afforded railroad workers under Federal Employers' Liability Act.

As to the federal law applying to the relationship between an injured railroad worker and the doctor hired by his employer, we call the Court's attention to the case of *Central of Georgia Railway Company vs. Ramsey*, 275 Ala. 7; 151 S. 2nd, 725, wherein the plaintiff had sustained an ankle injury in the course of his employment and filed his action for damages under the Federal Employers' Liability Act. In that case the plaintiff had been repeatedly informed by the defendant's doctors that his foot would be all right and told that he could go back to work. As a result of this, he signed the release with the railroad and later discovered the fact that the ankle had not and would not recover. The Alabama Supreme Court, in following the federal law, said that the weight of evidence necessary to sustain plaintiff's allegation that the releases were signed through mutual mistake of fact is only the scintilla rule of evidence in order to submit the question to a jury. The Court went on to say that an injured employee who executes a release, acting upon the assurance of his employer's doctors that he will soon be all right, is entitled to rescind the release if the assurances are believed by both the patient and the physician, the case being one of mutual mistake, or if the statement is not believed by the physician, the case being one of fraud. For further cases on the question of representation by defendant railroad's physicians that the injured employee was recovered and could return to full duty is, if untrue, such a misre-

presentation as will void a release in reliance thereon see: *Graham vs. The Atchison, Topeka and Sante Fe Railroad Company* (CA9), 176 F.2d 819; *Ciletti vs. Union Pacific Railroad Company* (CA2), 196 F.2d 50; *Humphrey vs. Erie Railroad Co.* (DC NY), 116 F. Supp. 660; *Atchison, Topeka and Sante Fe Railroad Co. vs. Peterson,* 34 Ariz. 292, 271 P. 406; *Matthews vs. Atchison, Topeka and Sante Fe Railroad Co.,* 54 Cal. App. 2nd 549, 129 P. 2d 435; *Bass vs. Seaboard Air Line Railroad Co.,* 205 Ga. 458, 53 S.E. 2d 895; *Estes vs. Magee,* 62 Idaho 82, 109 P. 2d 631; *Fort Worth & Rio Grande Railroad Co. vs. Pickens,* 153 S.W. 2d 252, Rev.'d 139 Tex. 161, 162 S.W. 2d 691.

The trial court committed prejudicial error in directing a verdict on the grounds that there was no mutual mistake of fact concerning appellant's injuries. The evidence clearly established that appellant was injured while in the course of his employment; that it is and was the custom and practice of railroad, and appellee in particular, to provide medical attention for its employees who are injured or become sick while performing the duties of their employment in the scope of their employment. Appellant was sent by defendant to Dr. Burkholder, who was the company doctor for New York Central employees at that time. Dr. Burkholder called in a specialist, Dr. Earnest, to treat the appellant. Appellant was never consulted as to what doctors he would like to have treat him. All of the doctors were paid by appellee. All of the hospital bills were paid by appellee, pursuant to the usual custom and practice of the railroads. At the time appellant signed the release he fully believed that he had fully recovered from his injuries. The only physicians who advised him as to his recovery were those employed by the appellee. The evidence showed that these physicians also believed that appellant had recovered.

The Court of Common Pleas ruled as a matter of law that Dr. Earnest was plaintiff's physician and was not the agent of the New York Central. This is in direct conflict with the law of the land under the Federal Employers' Liability Act. The entire question of agency and independdent contractors, such as physicians, is discussed at great length in the case of *Mangrum vs. Union Pacific Railroad Company,* 230 Cal. App. 2nd 960. In the *Mangrum* case the employee became ill while working on one of Union Pacific's trains. The railroad called in a physician who incorrectly diagnosed the employee's condition as bronchitis, whereas the employee actually had pneumonia and died later that day. The Court ruled that this physician was the agent of the railroad as a matter of law under the Federal Employers' Liability Act. The court held that there were two tests applicable to determine whether or not the doctor, as a matter of law, was the agent of the railroad. The first test is: Was the doctor engaged in operational activity of the railroad, since the railroad can not operate properly without a full, healthy crew aboard the train, and secondly: Did the doctor perform services resulting in a financial benefit to the railroad, since the railroad was required by custom and practice to take care of its employees who were sick while on duty. Clearly then the *Mangrum* case is in direct conflict with the opinion reached by the Court of Appeals of the Sixth District of Ohio and the Court of Common Pleas of Lucas County, Ohio. The Court in the *Mangrum* case placed great reliance on determining the agency company on *Sinkler vs. Missouri Pacific Railroad Company,* 356 U. S. 326, 78 Sup. Ct. 758, and *McGuigan vs. Southern Pacific Company,* 129 Cal. App. 2nd 482; 277 Pac. 2nd 444. It is clear from the evidence in this case that Drs. Burkholder and Earnest were agents of the New York Central Railroad Company. The New York Central employed Dr. Burkholder to ex-

amine injured employees as custom and practice dictated. Dr. Burkholder called in Dr. Earnest to treat Mr. Kaufman's injuries thus the railroad received a direct financial benefit both from Dr. Burkholder's actions and Dr. Earnest's actions, as it is the custom and practice of the railroads to provide this type of medical service. Therefore, both Dr. Burkholder and Dr. Earnest were agents of the New York Central Railroad Company.

If Mr. Kaufman and Dr. Earnest both believed Mr. Kaufman had fully recovered, then there was a mutual mistake of facts to the extent of Mr. Kaufman's injuries as Dr. Earnest was the agent of the New York Central. If Dr. Earnest, in fact, did not believe that Mr. Kaufman had fully recovered, then Dr. Earnest, as agent for the New York Central, perpetrated a fraud upon Mr. Kaufman in inducing him to sign the release for the nominal sum of $1,100.00.

We further call the Court's attention to the case of *Wells vs. Gulf Mobile and Ohio Railroad Company,* 226 N. E. 2nd 662, for a discussion of mutual mistake of fact as to the extent of injuries.

Referring again to the case of *Central of Georgia Railroad Company vs. Ramsey, supra,* the Court in that case held that to tell a layman who has been injured that he will be about again in a short time is to do more than prophesy about his recovery. No doubt it is a forecast, but it is ordinarily more than a forecast; it is an assurance as to his present condition and is so understood. And if the patient acts upon such assurances, if they are believed by the patient, and by the physician, the case is a case of mutual mistake. If the statement is not believed by the physician, it is a case of fraud, and in either case the injured party is entitled to rescind the release. It is clear then that the trial court erred in removing from consideration by the jury the question of whether or not Drs.

Earnest and Burkholder were agents of the New York Central Railroad Company and whether or not the release should be rescinded by reason of mutual mistake of fact or fraud.

CONCLUSION.

The law is quite clear that Federal Employers' Liability Act cases must be decided by federal rather than state law. It is also clear that the jury, and not the court, must decide every disputed issue of fact. The law is clear that a release may be set aside in Federal Employers' Liability Act cases where there was a mutual mistake of fact or where the railroad defrauded the employee. The law is clear that if the railroad's doctors and the employee both believed the employee had recovered from his injuries, when in fact he had not, this is sufficient grounds for setting aside a release on the basis of mutual mistake of fact. Or if the employee believed that he had recovered, and the railroad's doctors concurred in this verbally, even though, in fact, they did not believe this, then there is a case of fraud and the release should be set aside. The record in the case now before this Court clearly falls within all of the above rules and it was obvious error by the Court of Appeals, Supreme Court of Ohio, and the Court of Common Pleas to fail to submit the issue of the validity of the release to a jury. Therefore, the Supreme Court of the United States should grant appellant's petition for Writ of Certiorari so that Ohio law can be brought into line with the rest of the nation.

Respectfully submitted,

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APPENDIX.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY.

(Entered December 11, 1968.)

It is ordered by the Court that this motion is overruled.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(Findings of Fact and Conclusions of Law).

This cause came on for trial on a petition filed June 12, 1964, alleging a cause of action arising June 26, 1961, wherein a railroad tank car on the siding track No. 22 at Air Line Junction, Toledo, Ohio, exploded, when one of the defendant railroad's switching crews, for whom plaintiff was acting as a brakeman, switched a box car from a lead track to Track 22, wherein said tank car was standing. The tank car at the time was loaded with liquid carbon dioxide.

The plaintiff's claim was that the defendant railroad was negligent in failing to inspect said tank car, and in switching said tank car at a speed that was greater than reasonable and proper, thus failing to provide plaintiff a safe place to work.

The defendant railroad denied these items of negligence, and further claimed any recovery on behalf of the plaintiff is barred by a release executed by him September 12, 1961. The execution of the release is admitted by the plaintiff.

By the reply, the plaintiff claimed the release was void as being fraudulently obtained and/or because of mutual mistake of fact.

This cause came to be heard on the merits of the petition, answer and reply, after a mistrial to a jury on the question of validity of the release alone.

Findings of Fact.

1. It is uncontroverted that the required inspections by the defendant railroad were in fact made as specified by the regulations of the Interstate Commerce Commission and American railroad practice.

2. There was a debatable question of fact as to the speed of the approaching box car just prior to the time of the explosion, requiring the submission of this issue to the jury, if the release were invalid.

3. The plaintiff was in the vicinity of the moving box car as required by his employment, but was not struck or knocked down by the explosion and fled from the scene after the explosion.

4. The tank car was not loaded according to Interstate Commerce Commission regulations by the shipper, who was not a party to this action.

5. The tank car itself was overdue for a required structural inspection by the tank car owner, who was not a party to this action.

6. The execution of the release, as a release, is admitted by the plaintiff who was familiar with release procedure.

7. Plaintiff alleged fraud in the procuring of the release in his reply but by his own testimony disclaimed any fraud and being bound by his judicial admission in effect withdrew the claim of fraud.

8. The issue of fraud having been withdrawn by the plaintiff, the only issue remaining as to validity of the release is on the basis of a claimed mutual mistake of fact.

9. The Court finds that Dr. Franklin Earnest was the treating physician for the plaintiff who diagnosed the plaintiff's injuries prior to the execution of the release as cervical radiculitis requiring treatment by the use of cervical traction.

10. Dr. Marvin Green, the treating physician after the execution of the release, also diagnosed cervical radiculitis with hypertrophic or degenerative arthritic changes in the plaintiff's back not relatable to the alleged explosion injury.

11. The evidence of plaintiff's injuries to his knowledge and that of the defendant railroad both before the execution of the release and after the execution of the release were substantially the same, and there is no evidence of mistake of fact as to the injuries of the plaintiff prior to release and after the release relied on either by the plaintiff or the defendant railroad, and, therefore, there is no issue of fact to submit to the jury.

Conclusions of Law.

1. There are debatable issues of fact as to the speed of the railroad car upon which reasonable minds could differ, normally requiring this issue to be submitted to the jury.

2. The claim of fraud was withdrawn by the plaintiff in open court, and he is bound thereby. On the claim of mutual mistake as to the injuries, the applicable federal law requires plaintiff to prove mutual mistake by a preponderance of evidence. (*Callen v. Pennsylvania Railroad Company,* 332 U. S. 625.) The Court finds there is no evi-

dence of mutual mistake which would furnish grounds for voiding said release.

3. The Court finds that under federal law the validity or invalidity of a release is a question for the jury, if there are issues of fact on which reasonable minds could differ as to fraud or mutual mistake. (*Dice v. Akron, Canton & Youngstown Railroad Company*, 342 U.S. 359.)

4. There being no evidence of either fraud or mutual mistake as to plaintiff's injuries, the Court finds the release executed by the plaintiff and delivered to the defendant September 12, 1961, is valid and that the defendant railroad is entitled to a directed verdict.

/s/ NICHOLAS J. WALINSKI,
Trial Judge.

FEDERAL EMPLOYERS LIABILITY ACT, § 1.
(45 U. S. C. A. § 51.)

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.—Definition of employees.—

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if

none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees or such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act (§§ 51-60 of this title), be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act (§§ 51-60 of this title) and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) (§§ 51-60 of this title), as the same has been or may hereafter be amended. (April 22, 1908, c. 149, § 1, 35 Stat. 65; August 11, 1939, c. 685, § 1, 53 Stat. 1404.)

FEDERAL EMPLOYERS LIABILITY ACT, § 5.
(45 U. S. C. A. § 55.)

§ 55. Contract, rule, regulation, or device exempting from liability.—Set off.—

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act (§§ 51-60 of this title), shall to that extent be

void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act (§§ 51-60 of this title), such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. (April 22, 1908, c. 149 § 5, 35 Stat. 66.)

FEDERAL EMPLOYERS LIABILITY ACT, § 6.
(45 U. S. C. A. § 56.)

§ 56. Actions—Limitation—Concurrent jurisdiction of courts.—

No action shall be maintained under this act (§§ 51-60 of this title) unless commenced within three years from the day the cause of action accrued.

Under this act (§§ 51-60 of this title) an action may be brought in a circuit (district) court of the United States, in the district of the residence of the defendant, or in which the cause of action rose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act (§§ 51-60 of this title) shall be concurrent with that of the courts of the several States. (April 22, 1908, c. 149, § 6, 35 Stat. 66; April 5, 1910, c. 143, § 1, 36 Stat. 291; August 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 988.)